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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/583,892	10/23/2006	Jean-Noel Thorel	128414	7353
25944	7590	03/04/2009	EXAMINER	
OLIFF & BERRIDGE, PLC			MILLIGAN, ADAM C	
P.O. BOX 320850				
ALEXANDRIA, VA 22320-4850			ART UNIT	PAPER NUMBER
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			03/04/2009	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/583,892	THOREL ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	ADAM C. MILLIGAN	4121	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 1/30/2009.

2a) This action is **FINAL**.                            2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 21-39 is/are pending in the application.

4a) Of the above claim(s) 32-35 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 21-31 and 36-39 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 10/23/2006 and 11/14/2006.

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.

5) Notice of Informal Patent Application

6) Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Status of Claims***

Claims 21-39 are currently pending.

### ***Information Disclosure Statement***

The information disclosure statements filed 10/23/2006 and 11/14/2006 fail to comply with 37 CFR 1.98(a)(2), which requires a legible copy of each cited foreign patent document; each non-patent literature publication or that portion which caused it to be listed; and all other information or that portion which caused it to be listed. It has been placed in the application file, but information referred to therein has not been considered.

Specifically, FR 2609309, FR2838055, FR2609397 and FR 26609309 are not provided in English and therefore were not considered.

### ***Election/Restrictions***

Applicant's election with traverse of Group I in the reply filed on 1/30/2009 is acknowledged. Group 1, including claims 21-31 and 36-39, is drawn to a dermal and/or cosmetic base. The traversal is on the grounds that Group I and Group II share a special technical feature. This argument is not persuasive because Brock (US 2003/0130636) teaches the use of each of mannitol, xylitol, and fructose (Paragraph 30) in a skin care product.

Applicants assertion that Brock fails to anticipate claim 21 is well taken, however, Brock does render claim 21 obvious.

Please note that as written, Claims 21 and 32 have only a skin care product in common because claim 32 refers to claim 1, which is currently cancelled.

Assuming that applicant intended for claim 32 to refer to claim 21, the technical feature common to claims 21 and 32 is a skin care product comprising mannitol, xylitol, and at least one of glucose, rhamnose, xylose, mannose, and fructose. Brock describes a skin care product comprising "one or more" of mannitol, xylitol, glucose, and fructose "and mixtures of such compounds." In light of this, it would have been obvious for one of ordinary skill in the art to combine mannitol, xylitol, and glucose and/or fructose into a skin care product in order to "increase the water content of the top layers of the skin" (Paragraph 30). Claims 21 and 32 do not contain a common "technical feature" which is nonobvious in light of the prior art. Therefore, in light of Brock, claims 21 and 32 lack an inventive step required for a "special technical feature."

Applicant asserts that there exists *a priori* unity of invention. The following excerpt sheds light on the differences between *a priori* and *a posteriori* lack of unity.

Lack of unity of invention may be directly evident "*a priori*," that is, before considering the claims in relation to any prior art, or may only become apparent "*a posteriori*," that is, after taking the prior art into consideration. For example, independent claims to A + X, A + Y, X + Y can be said to lack unity *a priori* as there is no subject matter common to all claims. In the case of independent claims to A + X and A + Y, unity of invention is present *a priori* as A is common to both claims. However, if it can be established that A is known, there is lack of unity *a posteriori*, since A (be it a single feature or a group of features) is not a technical feature that defines a contribution over the prior art. *PCT International Search and Preliminary Examination Guidelines, Paragraph 10.03*.

Applicant is correct insofar as claims 21 and 32 do not lack unity *a priori* because claims 21 and 32 do have a common technical feature. However, because the common

technical feature of claims 21 and 32 is obvious in light of the prior art, claims 21 and 32, do not contain a “special” technical feature. Therefore, instant claims 21 and 32 lack unity *a posteriori*.

***Priority***

This application claims the benefit of priority under 35 U.S.C. § 119 (a)-(d) based on PCT/FR04.03376, filed 12/23/2004, which claims benefit of France Application No. 0315290, filed 12/23/2003. Receipt is acknowledged of papers submitted under 35 U.S.C. 119 (a)-(d) which papers have been placed of record in the file.

Claims 21-31 and 36-39 have an effective filing date of 12/23/2004. Because intervening art is cited in this office action, Applicant may wish to provide a certified translation of France Application No. 0315290. Upon receipt of the certified translation, claims reciting information contained in France Application No. 0315290 may acquire priority over the intervening art.

***Claim Objections***

Claim 21-31 and 36-39 are objected to because of the following informalities: The terms "dermal" and "cosmetic" are not defined by the claim or specification and one of ordinary skill in the art would not reasonably understand the difference between the terms. Appropriate correction is required.

***Claim Rejections – 35 U.S.C. § 112—second Paragraph***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 21-31 and 36-39 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 24 contains the trademark/trade name “Rhamnosoft”. Where a trademark or trade name is used in a claim as a limitation to identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). The claim scope is uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademark/trade name is used to identify/describe biosaccharide gum-2 and, accordingly, the identification/description is indefinite.

### ***Claim Rejections – 35 U.S.C. § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 21, 27, 29, 36, 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over United States 2003/0130636 (Published 7/10/2003).

With regard to claim 21, US 2003/0130636 teaches a dermal gelenic base (Paragraph 13) whose aqueous phase contains mannitol, xylitol, glucose, and fructose (Paragraph 30). Each of these compounds is known to “increase water content on the top layer of the skin” (Paragraph 30). “It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art.” *In re Kerkhoven*, 205 USPQ 1069, 1072 (CCPA 1980). The same rational can be applied to combining multiple compounds, such as mannitol, xylitol, glucose, and fructose, which are known for the same purpose.

With regard to claim 27, US 2003/0130636 teaches the incorporation of a gelenic base (Paragraph 13) having an aqueous phase containing soybean oil (Paragraph 20).

With regard to claims 29, US 2003/0130636 teaches the incorporation of a gelenic base (Paragraph 13) having an aqueous phase containing rapeseed oil (Paragraph 20).

With regard to claim 36 and 37, US 2003/0130636 teaches recited ranges. Specifically, US 2003/0130636 teaches a polyol content between about 0.1% and about 30% of the total weight and the water content is about 70% to about 99% of the total weight (Paragraph 30). With regard to claim 37, US 2003/0130636 teaches liposoluble polyols comprise from about 0.1% to about 30% of the total weight (Paragraph 30). In the case where the claimed ranges “overlap or lie inside ranges disclosed by the prior art” a *prima facie* case of obviousness exists. *In re Wertheim*, 191 USPQ 90 (CCPA 1976). Further, “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 105 USPQ 233, 235 (CCPA 1955).

With regard to claim 39, US 2003/0130636 teaches the use of a gelenic base (Paragraph 13).

Claims 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over United States 2003/0130636 (Published 7/10/2003) as applied to claim 21 above, and further in view of 2004/0170670 (Published 9/2/2004).

The limitations of claim 21 have been discussed *supra* in the 103(a) rejection over US 2003/0130636. US 2003/0130636 teaches a skin moisturizer comprising a combination of mannitol, xylitol, fructose, and glucose.

US 2003/0130636 does not teach the incorporation of rhamnose, a fructooligosaccharide, or a combination of two of Rhamnosoft, cetearyl glucoside, mannitan laurate and glucose glutamate.

However, 2004/0170670 teaches a skin moisturizing composition comprising each of these limitations. With regard to claim 22, 2004/0170670 teaches a skin moisturizing composition comprising rhamnose (Paragraph 178). With regard to claim 23, 2004/0170670 teaches a skin moisturizing composition comprising cyclodextrin. With regard to claim 24, 2004/0170670 teaches a skin moisturizing composition comprising Rhamnosoft (e.g. Paragraph 38) and cetearyl glucoside (Paragraph 371).

It would have been prima facie obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of US 2003/0130636 with US 2004/0170670 because US 2003/0130636 teaches the use of a combination of moisturizers and US 2004/0170670 teaches specific moisturizers that could be added to such a list. Specifically, US 2003/0130636 teaches that humectants increase the water content of the top layers of skin (Paragraph 30). US 2003/0130636 then provides a non-exhaustive list of suitable humectants. US 2004/0170670 supplements the list of humectants with further topical soothing and moisturizing cosmetic products (Paragraph 178). "It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 205 USPQ 1069, 1072 (CCPA 1980).

Further, there existed a reasonable expectation that adding further skin soothing and moisturizing agents to a composition containing skin soothing and moisturizing agents would result in a composition having skin soothing and moisturizing properties.

Claims 21, 24 - 25, 28, 30, 31 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over United States 2003/0130636 (Published 7/10/2003) in view of 2004/0170670 (Published 9/2/2004) as applied to claims 21 and 24 above, and further in view of United States Patent 6423325 (Issued 7/23/2002).

The limitations of claims 21 and 24 are discussed supra in the 103(a) rejection over US 2003/0130636 and US 2004/0170670. Specifically, US 2003/0130636 and US 2004/0170670 teach a skin moisturizer comprising mannitol, xylitol, fructose, glucose, Rhamnosoft, cetearyl glucoside, soy oil and rapeseed oil.

The combination of or US 2003/0130636 and US 2004/0170670 does not teach the incorporation of fish oil or linseed oil.

However, US 6423325 teaches a moisturizing skin care composition comprising linseed oil (Column 4, Lines 47-48) and fish oil (Column 4, Line 46). US 6423325 further teaches that fish oils and linseed oils are useful because they are rich in triglycerides such as  $\alpha$ -linolenic acid (Column 4, Lines 47-48), eicosapentaenoic acid (EPA) (Column 4, Line 47), and docosahexaenoic acid (DHA) (e.g. Column 3, Lines 35-40).

Because Fish oil and linseed oil are rich in DHA, EPA and  $\alpha$ -linolenic acid, a liporegulatory substance is present in US 6423325 which teaches the limitation of instant claim 25. This substance is present in a "rich" amount which teaches the

limitations of claim 31 and claim 38. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” In re Aller, 105 USPQ 233, 235 (CCPA 1955).

It would have been prima facie obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of US 2003/0130636 and US 2004/0170670 with US 6423325 because US 2003/0130636 and US 2004/0170670 teach a combination of moisturizers and oils containing substantial amounts of omega-3 fatty acids and US 2004/0170670 teaches that other oils high in omega-3 fatty acids are useful in topical skin care applications.

Further, there existed a reasonable expectation that substituting alternative sources of omega-3 fatty acids would not reduce the effectiveness of the topical moisturizer.

Claims 21, 25 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over United States 2003/0130636 (Published 7/10/2003), United States 2004/0170670 (Published 9/2/2004), in view of United States Patent 6423325 (Issued 7/23/2002) as applied to claim 21 and 25 above, and further in view of Sánchez-Machado et al. Food Chemistry 85 (2004) 439-444 (Published 8/1/2003).

The combination and limitations of claims 21 and 25 have been discussed supra in the 103(a) rejection over US 2003/0130636, US 2004/0170670, and US 6423325. The combination of US 2003/0130636, US 2004/0170670, and US 6423325 teaches a

gel-based cosmetic moisturizer comprising a combination of polyols and a liporegulatory substance. The liporegulatory substances included oils high in omega-3 fatty acids.

The combination of US 2003/0130636, US 2004/0170670, and US 6423325 do not teach the incorporation of a lipid extract of *Laminaria ochroleuca* into a cosmetic moisturizer.

However, Sánchez-Machado teaches *Laminaria ochroleuca* comprises high amounts of omega-3 fatty acids (page 441, Column 2).

It would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of US 2003/0130636, US 2004/0170670 and US 6423325 with Sánchez-Machado because US 2003/0130636, US 2004/0170670 and US 6423325 establish that omega-3 fatty acids are have beneficial effects, such as anti-aging effects (US 6423325 Column 5, Lines 12-17) when topically applied to the skin and Sánchez-Machado supplies an alternate source of obtaining high concentrations of omega-3 fatty acids. Therefore, the limitations of claim 26 are met.

Further, there existed a reasonable expectation that substituting an alternative source of omega-3 fatty acids, which contains said acids in high concentration would increase the effectiveness of the topical moisturizer.

### ***Conclusion***

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ADAM MILLIGAN whose telephone number is (571) 270-7674. The examiner can normally be reached on Monday through Thursday, 7:30 am - 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patrick Nolan, can be reached on (571) 272-0847. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/A.C.M./  
Art Unit 4121  
/Patrick J. Nolan/

Supervisory Patent Examiner, Art Unit 4121